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No. 88-1465

In the Supreme Court of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to an Article III forum for initial review of a government contracting officer's determination that petitioner had breached two contracts with the government.

2. Whether the court of appeals correctly upheld the factual findings of the Department of Agriculture Board of Contract Appeals that the reasons asserted by petitioner for its failure to perform on two timber contracts were not sufficient to mandate an extension of time to perform those contracts.

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1 F. Pollack & F. Maitland, *The History of English Law* (1st ed. 1895) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 855 F.2d 841.

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a-74a) was entered on August 29, 1988. A petition for rehearing was denied on November 30, 1988 (Pet. App. 75a-76a). The petition for a writ of certiorari was filed on February 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a logging company, was awarded two timber sale contracts requiring that it cut, remove, and pay

for specified timber on government lands (Pet. App. 2a-3a). Both contracts expired without petitioner's having begun performance (*id.* at 4a). The government resold the contracts to third parties for less than the original price (*id.* at 4a-5a). A contracting officer then assessed damages against petitioner for its default on the contracts; the officer measured damages by the difference between the contract price with petitioner and the resale price (*id.* at 5a).

2. Under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, as amended by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, a contractor may appeal a contracting officer's decision by either seeking review in the agency's board of contract appeals (41 U.S.C. 606) or by filing an action in the United States Claims Court (41 U.S.C. 609(a)(1)). Petitioner elected to appeal the contracting officer's decision to the Department of Agriculture Board of Contract Appeals (Board). Pet. App. 5a.

After a trial, the Board held that petitioner was not entitled to an Article III court to resolve initially its contract dispute with the government (Pet. App. 40a-47a). It also held that petitioner's failure to perform the contracts could not be excused on the ground that it should have been granted extensions of time or adjustments on the contracts (*id.* at 64a-70a). The Board found that petitioner was not entitled to the extensions as a matter of right or discretion under the applicable contract clauses and regulations that allow extensions when supported by a substantial overriding public interest, 36 C.F.R. 223.115 (Pet. App. 64a-70a).

3. The court of appeals affirmed (Pet. App. 1a-27a). The court first rejected petitioner's contention that a contractor's option of filing a case in the Claims Court is constitutionally inadequate because the Claims Court is not an Article III court. The court ruled that petitioner, hav-

ing chosen to appeal the contracting officer's decision to the Board, waived any objection to the nature of the alternative judicial forum (Pet. App. 8a-10a).

The court then rejected petitioner's contention that it should have been excused from performance of the contracts or given an extension of time for performance (Pet. App. 11a-17a). The court reached that conclusion on the basis of the Board's *de novo* findings that: (1) the reasons offered by petitioner for its failure to complete the contracts were unsupported by the facts, and (2) the true cause for the default was petitioner's economic decision to avoid paying the relatively high price of timber under those contracts (*ibid.*).

The court of appeals also rejected petitioner's claim that the contracting officers had erred by refusing to acknowledge that they had the authority to extend the contract under certain circumstances. Pet. App. 20a-21a. The court reasoned that petitioner misread the contracting officers' decision. The court stated that letters from the contracting officers reflected their "conclusion that no basis had been shown for an extension" (*id.* at 20a), not that the contracts precluded all extensions under all circumstances. Judge Bissell dissented on that point. She "read the record as demonstrating that the [contracting officers] gave absolutely no consideration" to their authority to extend (*id.* at 27a).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

1. Petitioner contends (Pet. 9-24) that a contractor involved in a dispute arising from a government contract is entitled to have that dispute adjudicated in the first in-

stance by an Article III court where the judge has life tenure and an irreducible salary. This Court noted in *CFTC* v. *Schor,* 478 U.S. 833 (1986), that Article III protects two interests: (1) " 'the role of the independent judiciary within the constitutional scheme of tripartite government,' " and (2) a litigant's " 'right to have claims decided before judges who are free from potential domination by other branches of government.' " *Id.* at 848 (citations omitted). And the Court ruled in *Schor* that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." *Ibid.* Here, petitioner waived any personal right it had to an Article III forum.[1]

Before passage of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, a government contractor was entitled to an initial adjudication of disputes by a non-Article III forum—either a Court of Claims trial judge (not an Article III judge) or an agency board of contract appeals. That initial decision could then be appealed to the Court of Claims, an Article III court, which reviewed all factual findings under a "presumption of correctness" standard. *Davis* v. *United States,* 164 Ct. Cl. 612, 616-617 (1964). Under the Federal Courts Improvement Act of 1982, a contractor still receives an initial decision by a non-Article III forum—the Claims Court or a board of contract appeals. 41 U.S.C. 606, 609. That decision is then reviewable by the United States Court of Appeals for the Federal Circuit on a de novo standard as

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[1] We do not rely, however, on the court of appeals' rationale on this point. The court ruled that petitioner waived its challenge to the Article I nature of the Claims Court because it proceeded before the Board instead of the Claims Court. But neither forum—the Board or the Claims Court—is an Article III forum. Consequently, petitioner did not willingly forgo an available Article III forum by proceeding before the Board.

to issues of law but on a "clearly erroneous" standard as to questions of fact. *Milmark Services, Inc.* v. *United States*, 731 F.2d 855, 857 (Fed. Cir. 1984).

Petitioner entered into the contracts at issue here on April 21, 1982 (Pet. App. 3a). At that time, neither the boards of contract appeals nor the trial judges of the Court of Claims held Article III status. Thus, petitioner understood that any dispute with the government would be resolved without an initial adjudication by an Article III judge. Accordingly, petitioner waived any alleged personal right to an Article III forum when it entered into a government contract with the knowledge that all disputes would be resolved in the first instance by a non-Article III tribunal. See generally *Geldermann, Inc.* v. *CFTC*, 836 F.2d 310 (7th Cir. 1987) (commodity brokerage firm waived any Article III rights when it joined board of trade with rules requiring arbitration of customer claims), cert. denied, No. 87-1584 (Oct. 3, 1988).[2]

2. In any event, petitioner's constitutional challenge is without merit. Article III does not "confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Schor*, 478 U.S. at 848. In reviewing Article III challenges, this Court considers "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts [and] the origins and importance of the right to be adjudicated." *Id.* at 851. In the case of a

[2] In *Schor*, this Court held that one Article III claim may not be waived—*i.e.*, whether "a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch" (478 U.S. at 851). For the reasons explained below, this "structural principle" protected by Article III (*id.* at 850) is not violated by the assignment of initial adjudication of government-contract claims to agency boards or the Claims Court.

government-contract claim, an agency board of contract appeals or the Claims Court decides nothing traditionally vested only in Article III courts.

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856), the Court considered whether the Constitution gives a person the right to an Article III forum when the government claims that that person owes it money. In particular, the Court held that Article III does not bar Congress from creating procedures apart from Article III courts to collect a debt due the government from one of its customs collectors. *Id.* at 281. Such actions, the court reasoned, were not traditionally matters for common law judges or Article III courts. *Id.* at 277-282.

The Court in *Murray's Lessee* specifically discussed contract debts allegedly owed to the government. The Court stated that "[w]e apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown." 59 U.S. (18 How.) at 277. The Court observed that contract debts owed the sovereign could be summarily collected by a so-called "writ of extent." *Ibid.* "In regard to debts due [the king] upon simple contract * * * the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt. This commission being returned, the debt found was thereby evidence by a record [in the king's exchequer], and an extent could issue thereon." *Id.* at 277-278. Hence, the Court concluded that a distinction "between public defaulters and ordinary debtors was understood in this country * * * before the formation of the constitution of the United States." *Id.* at 278.

Since *Murray's Lessee*, contract disputes with the government have traditionally been settled outside of an

Article III forum. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742 (1948) (Congress selected non-Article III forum to decide whether contractors made "excessive profits" that must be returned to the Treasury). Indeed, for many years, the standard government contract included a disputes clause providing that agency decisions on questions of law and fact were final. See *United States* v. *Wunderlich*, 342 U.S. 98 (1951); *United States* v. *Moorman*, 338 U.S. 457 (1950). Thus, the Contract Disputes Act, as amended by the Federal Courts Improvement Act of 1982, did not take away from Article III courts any cases that historically had been theirs to decide. Instead of approving a system that would have made a contracting officer's decision final, Congress provided a choice of two forums—agency boards and the Claims Court. No court has ever suggested that a government contractor is entitled to more. See *United States* v. *Rush*, 804 F.2d 645, 647 (Fed. Cir. 1986) (no right to an Article III forum in a case brought by the government for the recovery of money paid to a construction contractor).

Petitioner's reliance on Blackstone (Pet. 16) is misplaced. Blackstone stated that the English Crown sued its subjects for debts on contracts in the Court of the Exchequer by filing an "Information." 3 W. Blackstone, *Commentaries on the Laws of England* 261 (Philadelphia 1772). Although the Court of the Exchequer was both a court of law and a court of equity, Blackstone explained that cases involving the King's debtors were called to answer in the court of equity. *Id.* at 44; see also 1 F. Pollock & F. Maitland, *The History of English Law* 170-171 (1st ed. 1895) (describing the business of the Exchequer in "call[ing] the king's debtors before it" as the work of "an administrative tribunal"). Thus, claims by the sovereign against a subject arising out of contract were hardly "the stuff of the traditional actions at common law

tried by the courts at Westminster in 1789." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment). The Constitution, therefore, does not require an Article III court to adjudicate all aspects of a dispute between the government and a contractor.

3. Petitioner next argues (Pet. 24-30) that the contracting officers improperly failed to exercise any discretion when petitioners sought extensions of time to perform the contracts. That contention does not warrant this Court's review.

Petitioner brought this action as an appeal to the Board from the contracting officer's decision finding petitioner in default on the two contracts. Pet. App. 1a-6a. The contracting officer found, and petitioner does not dispute, that petitioner had not performed its obligations. Hence, petitioner's alleged entitlement to the requested time extensions arose only as an affirmative defense—*i.e.*, as an excuse for its failure to perform. Petitioner had the burden of establishing that it was entitled to such extensions under the circumstances and that the Forest Service's refusal to extend the contracts constituted a first breach of contract. See, *e.g.*, *Cape Fox Corp.* v. *United States*, 4 Cl. Ct. 223, 235 & n.29 (1983) (citing *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1088-1090 (Ct. Cl. 1975)).

The Board found, however, that the Forest Service had not first breached the contracts by failing to grant extensions. Pet. App. 68a-70a. It found that none of the alleged causes advanced by petitioner for its failure to perform the contract was the real reason for its non-performance. Pet. App. 14a. Thus, whether the contracting officers wrongly believed that they lacked discretion to grant extensions is immaterial; petitioners simply did not prove that the government first breached the contract by not granting extensions.

The court of appeals understood this analysis and focused on the Board's *de novo* factual findings (Pet. App. 12a-17a). It upheld the Board's findings that petitioner's purported excuses for its default were entirely without basis in the record.[3] To be sure, the court also observed (*id.* at 20a) that the contracting officers' letters, read as a whole, showed that they understood that they could grant extensions in a proper case. Petitioner disagrees with that observation. But even if the court erred on that factbound question, the ultimate ruling that the government did not commit a first breach by refusing to extend the contracts is still correct and dispositive.

In sum, the Board found, and the court of appeals agreed, that "the underlying cause for [petitioner's] failure to perform the * * * contracts was [petitioner's] economic decision to avoid the higher price of the timber under those contracts." Pet. App. 14a; see also *id.* at 60a-61a, 68a. The two contracts at issue had been obtained with

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[3] Petitioner had requested an extension of the two timber contracts at issue because it allegedly needed to give priority to the removal of timber, under another contract, that had blown down. Pet. 4; Pet. App. 12a-13a, 57a-60a, 67a-68a. But, as the court of appeals stated, the "record shows that [petitioner] did not remove any timber from the * * * [area covered by the other contract] from September through November 1983 – the time during which it had planned to perform the present contracts." Pet. App. 13a. Before the Board and the court of appeals, petitioner offered two more reasons for its non-performance. First, it contended that its performance was delayed by a labor dispute. Pet. App. 15a-17a. In fact, however, the temporary closure of one mill due to a labor dispute occurred when there were no scheduled logging operations under the contracts at issue. *Id.* at 17a. Second, petitioner alleged that it was forced to give priority to the removal of fire-damaged timber under another contract. *Id.* at 12a-13a. The record again showed, however, that no harvesting of that fire-damaged timber occurred until the year after the two contracts were to be performed. *Id.* at 13a-14a.

high bids and petitioner defaulted, not because of unforeseen factors causing legitimate delays, but because it deliberately chose to log other less expensive timber first. *Ibid.* Thus, the Board's factual findings, upheld by the court of appeals, foreclose petitioner's argument that it had a sufficient excuse for its non-performance on the contracts to mandate an extension of time to perform.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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